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In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216.

THEODORE RISTAINO ET AL.,
PETITIONERS,

v.

JAMES ROSS, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Petitioners.

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Opinions Below.

The opinion of the Court of Appeals is reported at 508 F. 2d 754 (A. 158). The order of the District Court is not reported. The opinions of the Supreme Judicial Court for the Commonwealth of Massachusetts are reported at Mass. Adv. Sh. (1973) 839; 296 N.E. 2d 810 (A. 128) and Mass. Adv. Sh. (1972) 873; 282 N.E. 2d 70 (A. 111).

Jurisdiction.

The judgment of the court below was entered on December 31, 1974. The petition for a writ of certiorari was filed on March 26, 1975, and was granted on May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

I. Whether the lower court erred in determining that the refusal of the trial judge to ask prospective jurors a question specifically addressed to the issue of racial prejudice violated the rights of the respondent as guaranteed by the Fourteenth Amendment to the Constitution?

II. Whether the refusal to ask prospective jurors a question specifically addressed to the issue of racial prejudice constitutes error of constitutional dimension requiring reversal of a state court conviction by a federal court on a petition for writ of habeas corpus?

III. Whether *Ham* v. *South Carolina*, 409 U.S. 524 (1973), as interpreted by the First Circuit Court of Appeals, should be accorded retrospective application to a final state court conviction attacked collaterally upon a petition for writ of habeas corpus?

Constitutional Provision.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

On June 17, 1970, the respondent was brought to trial in Suffolk County Superior Court before a judge and jury on three indictments charging armed robbery (Indictment No. 48032), assault and battery by means of a dangerous weapon (Indictment No. 48112), and assault and battery with intent to murder (Indictment No. 48033).

Prior to the commencement of the trial of the respondent and his co-defendants, each counsel submitted motions for examination of prospective jurors, which proposed questions designed to discover bias or prejudice on the part of the veniremen. Of the seven questions submitted by respondent Ross, only one involved a racial element.

> "5. Are there are any of you who believe that a white person is more likely to be telling the truth than a black person?" (A. 23.)

The trial judge denied the motions (A. 33). After extensive voir dire, covering seven days, fourteen jurors were empanelled (A. 102-103). The final deliberating jury consisted of 10 whites and 2 blacks. *Commonwealth* v. *Ross*, Mass. , 296 N.E. 2d 810, 815 (1973).

On July 2, 1970, a verdict of guilty on each indictment was returned and the respondent was sentenced to the Massachusetts Correctional Institution, Walpole, for concurrent terms of 18-30 years for armed robbery, 6-10 years for assault with a dangerous weapon, and 18-20 years for assault and battery with intent to murder. The Massachusetts Supreme Judicial Court unanimously affirmed these convictions. *Commonwealth* v. *Ross*, Mass. , 282 N.E. 2d 70 (1972) (A. 111).

The respondent then filed a petition for a writ of certiorari in the United States Supreme Court on the issue of the scope of the voir dire examination of prospective jurors. On January 22, 1973, this Court granted certiorari, vacated the judgment, and remanded the case to the Massachusetts Supreme Judicial Court for further consideration in light of *Ham* v. *South Carolina*, 409 U.S. 524 (1973), decided on January 17, 1973. *Ross* v. *Massachusetts*, 410 U.S. 901 (1973).

On remand, the Supreme Judicial Court addressed the following issue:

> " . . . whether the *Ham* decision requires that the defendant's conviction should be reversed on the ground that the trial judge refused to ask the veniremen whether they were racially prejudiced." *Commonwealth* v. *Ross*, Mass. , 296 N.E. 2d 810, 811 (A. 128).

and concluded:

> "We do not believe that the *Ham* case announced a new broad constitutional principle requiring that questions, designed to discover possible racial prejudice, be put to prospective jurors in all State criminal trials when the defendant is black (or from some other racial minority group), even when the defendant has requested such an inquiry and the statutory framework permits questioning to discover bias." *Commonwealth* v. *Ross*, Mass. at , *Id.* at 815 (A. 134).

The respondent filed a second petition for a writ of certiorari in the United States Supreme Court on the same issue as that raised by his previous application. On December 3, 1973, the petition for a writ of certiorari was denied. *Ross* v. *Massachusetts*, 414 U.S. 1080 (1973); Justice Marshall, with whom Justices Douglas and Brennan joined, filed a dissenting opinion.

The respondent then filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. On June 15, 1974, the United States District Court granted the writ, stating:

> "The petitioner had a constitutional right to have the issue of racial prejudice specifically called to the attention of the prospective jurors." *Memorandum and Order* (A. 154).

The respondents therein filed notice of appeal in the United States Court of Appeals for the First Circuit. On December 31, 1974, the Court of Appeals for the First Circuit, by a two-to-one decision, affirmed the order of the District Court. *Ross* v. *Ristaino*, 508 F. 2d 754 (1st Cir. 1974) (A. 158).

Summary of Argument.

I. The opinion of this Court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973), does not require reversal of the respondent's state court conviction.

(1) *Ham* v. *South Carolina*, *supra*, is distinguishable from the instant case in that Ham's state court trial involved allegations of racially motivated prosecution, thus making the race of the defendant an issue. The instant case involves no peculiar or special circumstances. Moreover, the voir dire procedure employed in the instant case was far more detailed and conscientious than that employed by the trial judge in *Ham*, *supra*.

(2) This Court's decision in *Ham* did not announce a new constitutional rule of universal applicability. The decision merely stated that the failure to ask the proposed questions directed toward possible racial prejudice under the circumstances of that case violated the "fundamental demands of fairness" as guaranteed by the Fourteenth Amendment. Therefore, if the voir dire procedure is substantially fair, the mere failure to ask specific questions does not necessitate reversal of a state court conviction by a federal court upon a petition for writ of habeas corpus.

II. The First Circuit Court of Appeals has erred in determining that the refusal of a trial judge to ask a question addressed to the issue of racial prejudice is error of constitutional dimension cognizable by a federal court upon a petition for writ of habeas corpus. For, that determination was based merely upon speculation as to possible prejudice to the defendant and lacks any indication of manifest error as is traditionally required to justify federal court interference with state court criminal convictions. The First Circuit has, in effect, assimilated its task in this matter as that of a court of appellate review over the highest appellate court of the Commonwealth of Massachusetts.

III. A new constitutional rule mandating that specific questions on the issue of racial prejudice must, on the request of a black defendant, be asked of prospective jurors on voir dire should not be applied retroactively to those cases where trial has commenced [redacted] (to the date of the decision announcing the new rule. Such a procedural rule, when analyzed in light of the purpose of the new rule, the reliance on the prior rule and the effect of retrospective application of the new rule on the administration of justice, falls within that category of cases involving a defendant's right to an impartial jury, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), and for retroactivity purposes should not be given more extended application than accorded the rules announced in *Duncan*, *supra*, and *Taylor*, *supra*, which were held prospective. *DeStefano* v. *Woods*, 392 U.S. 631 (1968), and *Daniel* v. *Louisiana*, 420 U.S. 31 (1975).

Moreover, a procedural Due Process rule should not be held applicable to state court judgments which have become final and are not attacked collaterally upon a petition for a writ of habeas corpus. Such application violates a valid state interest in the finality of judgment. The petitioners suggest that the test to be applied is whether the state court procedures complied with Fourteenth Amendment Due Process. If that test is met, the purpose for which habeas corpus is made available is satisfied and nothing more should be required.

Argument.

I. Ham v. South Carolina, 409 U.S. 524 (1973), does Not Require that Specific Questions Addressed to Possible Racial Bias be Asked in the Instant Case.

A. *Ham v. South Carolina, 409 U.S 524 (1973), Is Distinguishable from the Case at Bar.*

In *Ham* v. *South Carolina, supra,* this Court held that the procedure followed by the trial court in conducting the voir dire of prospective jurors in that case violated the defendant's Fourteenth Amendment Due Process rights. The facts surrounding Ham's conviction formed the basis for this Court's decision. Ham was tried and convicted in South Carolina for possession of marijuana. Ham was a young bearded Negro well-known in the community and well-known as a civil rights activist. His defense at trial was that law enforcement officers were "out to get him" because of his civil rights activities and that he had been framed. Prior to the trial judge's voir dire examination of prospective jurors, counsel for Ham requested that the judge ask the jurors four questions relating to possible prejudice against the defendant. Two of the questions were addressed to the possibility of racial prejudice,[1] one to possible prejudice against beards and one to possible prejudice resulting from pretrial publicity. The trial judge declined to ask these specific questions requested by Ham, but did pose three general questions as to bias, prejudice or partiality as required by South Carolina statute.[2]

---

[1] "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?"

"2. You have no prejudice against Negros? Against black people? You would not be influenced by the use of the term 'black?'"

[2] S.C. Code § 38-202 (1962).

Within this factual framework, this Court held:

> " . . . we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the issue of racial bias. Cf. *Groppi* v. *Wisconsin*, 400 U.S. 505, 508 (1971); *Bell* v. *Burson*, 402 U.S. 535, 541 (1971)." (Emphasis supplied.) *Ham* v. *South Carolina*, 409 U.S. at 527.

Thus, within the unique factual framework present in the *Ham* case, this Court was compelled to find that the failure to question prospective jurors on the issue of racial prejudice violated fundamental fairness.

Petitioners agree that where racial overtones are apparent in a case, where there is a real issue as to the credence to be given the testimony of a black defendant and where the defendant is demonstrably a special target for racial prejudice, fairness requires that the attention of prospective jurors must be focused upon the possibility of racial prejudice. However, the burden is on the defendant to demonstrate that such a fact pattern exists; the mere existence of a black defendant is not sufficient. Petitioners submit that the defendant in the instant case not only did not meet this burden, but could not, as those special elements are not present in the instant case, and Ross' state court trial complied with the essential demands of fairness.

Ross and two co-defendants were tried and convicted of armed robbery, assault and battery by means of a dangerous weapon and assault and battery with intent to murder. Prior to the voir dire examination of prospective jurors, counsel for Ross requested that the trial judge ask the veniremen seven questions. Only one of these questions touched upon the issue of racial prejudice.

> "5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" (A. 23.)[3]

The discussion between the trial judge and counsel concerning the voir dire procedure indicates that counsel for the defendants were concerned with possible prejudice in two areas: (1) racial prejudice because the defendants were black; and (2) possible lack of impartiality because the victim was a security guard. In chambers, with respect to the racial question, the trial judge asked the attorney for co-defendant Daniels:

> " . . . I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.
>
> "Is there anything peculiar about, Mr. Donnelly?

[3] Additional questions, specifically addressed to racial prejudice, were requested by co-defendants Daniels and Williams (A. 24-28). However, as found by the Supreme Judicial Court of Massachusetts, Ross did not adopt those questions as his own and may not now argue that it was error for the trial judge to refuse to ask those questions. See *Commonwealth* v. *Ross*, Mass. , 296 N.E. 2d 810, 812 n.4 (1973) (A. 130).

> "[Counsel for the defendant, Daniels]: No, just the fact that the victim is white, and the defendants are black." (A. 29.)

Counsel for Ross made no statement with reference to any peculiar or special circumstance. Therefore, no special circumstances were brought to the attention of the trial judge, nor do any exist. There was no indication that Ross might have been a special target for racial prejudice. In contrast, the *Ham* trial contained indications of racially motivated prosecution. The questions requested in *Ham* were addressed specifically to the question of possible racial bias against the defendant. In *Ross*, however, the only question requested (whose denial is at issue) was not specifically addressed to possible racial prejudice directed against the defendant. The question was merely addressed to the credibility to be afforded a black witness as opposed to a white witness. Ross did not testify. His credibility therefore did not become an issue. Therefore the refusal to grant the request could not be deemed prejudicial.

The colloquy between the trial judge and counsel for the defendants demonstrates that he was sensitive to the concern of the defendants and carefully determined the procedure he thought would best guarantee a fair trial.

> "I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into the details as to my reasons, I feel that no purpose would be accomplished by asking such questions *in this instance*." (Emphasis supplied.) (A. 29.)

" . . . this Judge anyway — and I am sure all Judges of this Court — would take the time to impress upon them before, during, and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations." (A. 29-30.)

"I believe that that is the best that can be done with respect to the problems which — as I said, I regard as extremely important. . . ." (A. 30.)

As one of his reasons for denying the defendant's request for specific questions addressed to racial prejudice, the trial judge stated:

" . . . I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it." (A. 30-31.)

While refusing to ask the specific questions requested, the trial judge did recognize the importance of the problem and indicated that he would give a preliminary instruction with particular reference to statutory question No. 1 (A. 29-30).[4]

[4] Mass. Gen. Laws, c. 234, § 28 " . . . whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; . . . "

The trial judge also agreed to question the prospective jurors with regard to their relationship with law enforcement officers.[5] (A. 31.)

Petitioners submit that examination of the entire colloquy between the trial judge and counsel for the defendants indicates that the trial judge was sensitive to the problem of possible prejudice and adopted a procedure which he felt could best insure fundamental fairness without injecting racial bias into the trial.

As each pool of prospective jurors was examined, the trial judge instructed them that they must inform the court if they were unable to return a fair and impartial verdict based solely upon the evidence (A. 36-38, 47-49, 71-73, 82-84, 95-97).

"Can you under oath return a fair and impartial verdict based upon the evidence that you hear in the courtroom, and not on any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind.

"You will recall that when you took your oath, that it was probably impressed upon you the first day that you arrived here, and perhaps has been emphasized many times by Judges throughout the month, that you were told that under your oath, you have an absolute duty to render fair and impartial verdicts based upon the evidence that you hear in the courtroom, and no extraneous factors.

[5] "Are you presently, or have you in the past worked for a police department or a district attorney's office, or do you have any immediate relative who also is or was engaged in such work. Is there a member of your immediate family, brother, sister, husband, wife, son, who is working in that capacity, or has worked in that capacity in a police department or district attorney's office, or have you worked in that capacity, or do you work in that capacity at the present time?" (A. 38.)

"The Clerk in asking you the first question is giving you an opportunity to inform the Court, if you believe that you cannot render a fair and impartial verdict on the evidence in this case; giving you an opportunity to inform the Court if you have serious doubt as to whether you can render a fair and impartial verdict on the evidence of this case.

"Under this question, and under your oath, when this question is asked, if you believe that you cannot render a fair and impartial verdict on the evidence in this case, or if you have a doubt as to whether you can so render a fair and impartial verdict on the evidence in this case, you have a duty to inform the Court when that question is asked by standing or raising your hand.

. . . . . .

"In addition to examining whatever you know from the news media in terms of this first question which the Clerk will put to you, I would direct you to examine all aspects of the case and everything that you presently know about the case, both in this courtroom and from what I have told you so far, and determine whether you should inform the Court as to whether you cannot return a fair and impartial verdict, or whether you have a doubt as to your capacity to render a fair and impartial verdict based upon the evidence in the case." (A. 71-72, 73.)

After the defendants were asked to stand and were set at the bar to be tried, the clerk posed the questions, outlined above, to the prospective jurors. Several jurors raised their hand, indicating possible prejudice. Each of these jurors was questioned individually by the trial judge. One prospective juror was excused for admitted racial prejudice; two were excused for unspecified prejudice; seven prospective jurors were

excused because they had already formed an opinion; seven were excused because of connections with police work; and one prospective juror was excused because of affiliation with the university where the crime had occurred. *Commonwealth* v. *Ross*, Mass. at , 296 N.E. 2d at 815 (A. 133-134).

In a further effort to insure a fair trial and prevent racial bias from becoming an issue, the trial judge decided "in the interest of good sense" not to mention the Muslim names of defendants Daniels and Williams as they appeared in the indictments, but to refer to them as Ross, Daniels, and Williams. *Commonwealth* v. *Ross*, Mass. at , *Id.* at 813 (A. 39).

The final jury of twelve was composed of ten white persons and two black persons. *Commonwealth* v. *Ross*, Mass. at , *Id.* at 815. As opposed to the trial judge in *Ham*, who merely asked four general questions, the trial judge, in the instant case, scrupulously examined the jurors on the issue of bias and prejudice and several jurors were excused for this reason. Thus, the petitioners suggest that the possibility that racial bias might infect the jury in the instant case was sufficiently cured by the trial judge's instructions coupled with the specific questions addressed to the prospective jurors.

The special circumstances of *Ham* are not present in the instant case and the trial judge in the instant case was sensitive to the possibility of a racial problem and responded to it, in contrast to the trial judge in *Ham*.

For all the above reasons, the petitioners submit that *Ross* is distinguishable from *Ham* and that the First Circuit Court of Appeals erred in holding *Ham* applicable to the facts of this case.

B. *This Court in Ham v. South Carolina, 409 U.S. 524 (1973), did Not Enunciate a New Constitutional Rule of Universal Applicability.*

In *Ham*, 409 U.S. at 526-527, this Court held only that the principle enunciated in *Aldridge* v. *United States*, 283 U.S. 308 (1931), was grounded upon the Fourteenth Amendment Due Process Clause. In *Aldridge*, 283 U.S. at 310, this Court, in the exercise of its supervisory powers over the lower federal courts, stated that the "essential demands of fairness" required the trial judge under the circumstances of that case to interrogate the veniremen with respect to racial prejudice upon the request of counsel for a Negro criminal defendant. 283 U.S. at 310.[8]

This Court, in *Ham*, noted that the *Aldridge* decision was not grounded upon any constitutional requirement. However, the Court reasoned that,

> "[s]ince one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands of fairness,' *e.g.*, *Lisenba* v. *California*, 314 U.S. 219, 236 (1941), and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, *Slaughter-House Cases*, 16 Wall. 36, 81 (1873), we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice." 409 U.S. at 526-527.

[8] While it has been maintained that no special circumstances were involved in *Aidridge*, a close reading of that opinion indicates that the request was based upon far more than the fact that the defendant was black and the victim white. Rather, counsel represented to the trial judge that at a prior trial of the defendant where the jury had disagreed, a woman juror had told him that the fact that the defendant was a negro had "somewhat influenced her." The Court stated:

> "The reference to what counsel had heard as to the attitude of a juror on the previous trial, where the jury had disagreed, indicated the purpose of the question, which was clear enough to invite appropriate action by the court." 283 U.S. at 311.

Thus, this Court ruled only that essential fairness was constitutionally guaranteed and made applicable to the states by the Fourteenth Amendment. The Court did not hold that the Constitution required that a specific procedure be utilized. In fact, this Court specifically recognized that it is within the discretion of the trial judge to determine the procedure to be utilized in order to insure fairness.

> " . . . the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner. The Court in *Aldridge* was at pains to point out, in a context where its authority within the federal system of courts allows a good deal closer supervision than does the Fourteenth Amendment, that the trial court 'had a broad discretion as to the questions to be asked,' 283 U.S., at 310. The discretion as to form and number of questions permitted by the Due Process Clause of the Fourteenth Amendment is at least as broad. In this context, either of the brief, general questions urged by the petitioner would appear sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." 409 U.S. at 527.

The Supreme Judicial Court has, petitioners suggest, properly interpreted this decision to be limited to its facts.

"We hold, therefore, that the *Ham* decision does not, in this case, dictate that the trial judge was constitutionally required to question prospective jurors specifically concerning their possible racial prejudices beyond the comments and questions that were put to them. While the due process clause of the Fourteenth Amendment requires the states to insure the essential demands of fairness in criminal trials, we believe that the judge's refusal to ask specific questions did not, in this case, violate the defendant's right to the demands of fairness." *Commonwealth* v. *Ross*, Mass. Adv. Sh. (1973) at 846.

The Ninth Circuit has similarly distinguished the *Ham* decision.

"*Aldridge* and *Ham* are distinguishable. In *Aldridge* a black man was charged with the murder of a white policeman. All the jurors were white. Recognizing that the trial court has 'a broad discretion as to the questions to be asked,' the Court held that the exercise of this discretion is 'subject to the essential demands of fairness' and that under the circumstances of that case the court erred in failing to permit counsel to ask questions relative to 'racial prejudice.' 283 U.S. at 310-311. . . . *Ham* involved the prosecution of a black civil rights leader for possession of drugs. 'His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge." 409 U.S. at 525. . . . Following *Aldridge* the Court again recognized 'the traditionally broad discretion accorded to the trial judge in conducting *voir dire*', 409 U.S. at 528 . . ., but held that *under the facts shown by the record* the jurors should have been interrogated on 'the issue of racial bias.' *Id.* at

527." (Emphasis supplied.) *United States* v. *Walker*, 491 F. 2d 236, 239 (9th Cir. 1974).

The petitioners acknowledge that five Circuit Courts of Appeal, on direct review of cases arising within the federal system, have interpreted *Ham* as enunciating a new constitutional requirement. However, in none of these cases is the scope of that requirement delineated.[7]

In *United States* v. *Booker*, 480 F. 2d 1310 (7th Cir. 1973), the Seventh Circuit, acting within its supervisory capacity, addressed the issue and held that *Aldridge* was controlling, stating:

"[f]or that reason reversal need not rest on a constitutional ground." 480 F. 2d at 1311.

However, the court also discussed the import of the *Ham* decision and stated:

"It is nevertheless significant that a unanimous Supreme Court recently reversed a state judgment because the trial

[7] *United States* v. *Robinson*, 485 F. 2d 1157 (3d Cir. 1973); *Featherston* v. *United States*, 491 F. 2d 98 (5th Cir. 1974); *United States* v. *Ross*, 477 F. 2d 551 (6th Cir. 1973); *United States* v. *Powers*, 482 F. 2d 941 (8th Cir. 1973); *United States* v. *Robinson*, 475 F. 2d 376 (D.C. Cir. 1973). Cf. *United States* v. *Grant*, 494 F. 2d 120 (2d Cir. 1974) (failure to ask a question directed to racial bias was, if error, harmless beyond a reasonable doubt in view of overwhelming evidence).

judge refused to ask prospective jurors about possible prejudice against black people. [Citation omitted.] There was perhaps a greater risk of prejudice against Ham because of his participation in civil rights activities than against the appellant in this case, but the Court's appraisal of the error as violative of the 'essential demands of fairness' protected by the Due Process Clause, 409 U.S. at 526 . . . persuades us that on direct review of a federal conviction we should reverse without attempting to appraise the actual likelihood of prejudice to this appellant." *Id.* at 1311.

The petitioners suggest that the language of the Seventh Circuit indicates that upon a *collateral* review of a state court proceeding some indication of actual prejudice would be required. If the Seventh Circuit has interpreted *Ham* as announcing a new constitutional rule of universal applicability it would be inconsistent with such a rule to then indicate that an appraisal of the actual likelihood of prejudice would be required upon collateral review. This view is consistent with that of the Supreme Judicial Court of the Commonwealth requiring that there be present some indication that the defendant is a special target of racial prejudice before refusal to address questions as to the possibility of racial prejudice on the part of prospective jurors constitutes a denial of fundamental fairness.

"We cannot agree that the mere accusation of a black defendant in a crime with a white victim or the fact that the victim is a security guard constitutes 'circumstances which reasonably present the issue of racial prejudice' (*Commonwealth* v. *Ryles*, Mass. , (1973), cert. den. 414 U.S. 980 (1973)), and make the defendant

a special target for racial prejudice. See *Commonwealth* v. *Ross*, Mass. , (1973), cert. den. 414 U.S. 1080 (1973); *Commonwealth* v. *Bumpus*, Mass. (1974). 'We have several times indicated that the fact that the defendant is black and the victim white does not suffice to bring a case within the *Ham* rule and to require specific questions by the trial judge as to possible prejudice among the veniremen.' *Commonwealth* v. *Bumpus*, *supra*, at . The ethnic identities of the defendant and victim, without other factors underscoring the racial elements of the case and their specific application to the defendant, are insufficient to invoke the special precautions of the *Ham* case. The victim's occupation alone is not one such factor." *Commonwealth* v. *Lumley*, Mass. , 327 N.E. 2d 683, 687 (1975).[8]

The decision of the First Circuit Court of Appeals seeks to avoid resolution of the question of the proper interpretation of *Ham*.

"The contours of the *Ham* decision were not sharply defined by the Court. Justice Rehnquist's opinion did not explicitly state that whenever a black defendant requests the trial judge to inquire specifically on the issue of racial prejudice on *voir dire* the trial judge must do so. Nor did the opinion explicitly state that the defense request for specific questions directed to racial prejudice need only be honored where the defendant was a civil rights leader or

[8] See also, *Commonwealth* v. *Ryles*, Mass. (1973) (Mass. Adv. Sh. [1973] 849), *cert. denied*, 414 U.S. 980 (1973); *Commonwealth* v. *Rodriguez*, Mass. (1973) (Mass. Adv. Sh. [1973] 1181); *Commonwealth* v. *Bumpus*, Mass. (1974) (Mass. Adv. Sh. [1974] 477); *Commonwealth* v. *Pinckney*, Mass. (1974) (Mass. Adv. Sh. [1974] 483).

other 'special target of racial prejudice,' which was the construction the Supreme Judicial Court gave *Ham*." (Footnotes omitted.) *Ross* v. *Ristaino*, 508 F. 2d 754, 756 (1st Cir. 1974).

The court then approved an implicit finding of the federal District Court that,

> "a black defendant charged with violent crimes against a white security officer would be likely to be a special target of racial prejudice." *Ibid.*

Thus the court has extended the scope of the *Ham* decision far beyond the framework of that case and, in effect, has determined that the *Ham* rule is applicable to every case involving a black defendant and a white victim. Further, the court has failed to assert any constitutional basis for doing so.

Petitioners suggest that the Supreme Judicial Court's interpretation of *Ham* in *Commonwealth* v. *Ross*, *supra*, and related cases, is correct.

First, the language used by the majority is specific.

> " . . . we think that the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the

> issue of racial bias. Cf. *Groppi* v. *Wisconsin*, 400 U.S. 505, 508 (1971); *Bell* v. *Burson*, 402 U.S. 535, 541 (1971)." (Emphasis supplied.) 409 U.S. at 527.

The Court precisely stated that the facts of the case necessitated their ruling of law. However, the United States District Court dismissed the language used by this Court, stating, in effect, that Mr. Justice Rehnquist merely utilized such "common judicial locutions" as "in this case" and "under the facts shown on this record." *Memorandum and Order* (A. 153). Petitioners submit that this Court meant exactly what it said; that this specific reference to the facts of the case is traditional in cases in which the Court is deciding that a particular fact pattern requires a determination that a defendant's right to due process has been violated.[9]

Second, the petitioners suggest that by limiting the constitutional basis for their decision to the Fourteenth Amendment, this Court was limiting invocation of the *Ham* rule to cases demonstrating a significant possibility of prejudice.

Certiorari was granted in *Ham* limited to the question:

> "Whether the trial judge's refusal to examine the jurors on *voir dire* as to whether petitioner's race or pretrial publicity would affect their ability to render a fair verdict violated petitioner's right to an impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the Constitution?" 404 U.S. 1057 (1972).

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[9] See: *Webb* v. *Texas*, 409 U.S. 95, 98 (1972):

> "In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."

In his petition for certiorari (Supreme Court Docket No. 71-5139) Ham argued that his right to an impartial jury as guaranteed by the Sixth and Fourteenth Amendments had been violated by the trial judge's refusal to examine jurors as to whether petitioner's race would affect their ability to render a fair verdict. This Court was presented, therefore, with the opportunity to rule that the Sixth Amendment guarantee of an impartial jury mandated that questions addressed to the possibility of racial prejudice always be asked of veniremen where there is a black defendant. The majority of this Court, however, declined the opportunity and decided *Ham* solely upon the Due Process Clause of the Fourteenth Amendment. Nothing in the majority opinion indicates that the Sixth Amendment guarantee of a right to an impartial jury required examination of prospective jurors on the issue of racial prejudice. However, in contrast to the majority opinion in *Ham*, Justice Marshall, concurring in part and dissenting in part, based his concurrence upon the Sixth Amendment guarantee to an impartial jury, thereby disagreeing with the majority opinion that the trial judge acted properly in foreclosing other avenues of relevant inquiry, specifically, inquiry as to prejudice against beards. *Ham* v. *South Carolina*, 409 U.S. at 534. Indeed, Justice Marshall based his dissent from the denial of Ross' second petition for writ of certiorari upon the same Sixth Amendment language. *Ross* v. *Massachusetts*, 414 U.S. 1080 (1973).

The fair inference then is that the majority of this Court in *Ham* did not think that the issue raised in *Ham* necessitated a Sixth Amendment ruling which would be applicable to every case in which there was a black defendant, but, simply, that it was not fair to refuse to ask the questions under the circumstances present in that case. Therefore, petitioners submit that by so limiting the ground for the decision in *Ham* to the Fourteenth Amendment Due Process Clause, the majority of this

Court intended to limit the effect of their decision to those cases involving circumstances where the possibility of prejudice was of sufficient dimension as to require a deviation from the voir dire procedure normally employed in the state courts. Lacking a showing of special circumstances, the petitioners submit that the voir dire procedures employed in the instant case were sufficient to insure the essential demands of fairness required by the Fourteenth Amendment as enunciated in *Ham* v. *South Carolina*, *supra*, and nothing more is required.

II. The Error Complained of in the Instant Case does Not Reach a Level of Constitutional Dimension Justifying Federal Court Interference with a State Court Conviction Attacked Collaterally upon a Petition for Writ of Habeas Corpus.

At trial, all prospective jurors were asked the statutory questions required under Mass. Gen. Laws, c. 234, § 28. In addition, the trial judge exercised his discretion to broaden the scope of the voir dire, *Commonwealth* v. *Geagan*, 339 Mass. 487 (1959), cert. denied sub nom. *Geagan* v. *Massachusetts*, 361 U.S. 895 (1959), and questioned the jurors as to their relationship with law enforcement authorities (A. 47, 49, 71, 73, 82, 84, 95, 97). He repeatedly directed the veniremen to question their sensitivity as to any bias or prejudice.

> "Can you under oath return a fair and impartial verdict based upon the evidence that you hear in the courtroom, and not on any extraneous factors; no bias or prejudice or personal interest in the case, and no prejudice of any kind." (A. 71.)

Both the federal District Court and the First Circuit Court of Appeals acknowledged that the questions propounded to the prospective jurors were far more extensive and carefully worded than those in either *Ham* or *Aldridge*. They were exemplary in every respect. *Ross* v. *Ristaino*, 508 F. 2d 754, 755 (1st Cir. 1975). However, the court held that a black defendant "would be likely" to be a special target for racial prejudice and, therefore, the failure to ask a question specifically addressed to the racial issue required reversal of the state court conviction. *Id.* at 756, 757.

The United States Supreme Court has strictly adhered to the principle that the findings of the trial court upon the issue of voir dire ought not be set aside by a federal court on collateral review of a state court conviction absent a showing of manifest error. *Reynolds* v. *United States*, 98 U.S. 145, 156 (1878) [quoted with approval in *Irvin* v. *Dowd*, 366 U.S. 717, 723-724 (1961)]. While reaffirming the essential demands of fairness test and the broad discretion of the trial judge in *Ham*, this Court left unaltered the manifest error standard of *Reynolds*. However, in this case, based merely upon speculation, the federal court has elevated this procedural issue (the scope of voir dire) to one of constitutional dimension, and reversed the state court conviction without the requisite demonstration of manifest error.

The petitioners submit that mere speculation as to the possibility of unfairness does not constitute error of constitutional dimension.

> " . . . [T]he burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and that it [must] be sustained not as a matter of speculation but as a demonstrable reality." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942).

> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt* v. *United States*, 218 U.S. 245, 251 (1910).

The petitioners further submit that on a collateral attack upon a final state court judgment a federal court may interfere only when the alleged error is so conspicuous and substantial as to result in a constitutionally unfair trial.

> "It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court interference is warranted." *Chavez* v. *Dickson*, 280 F. 2d 727, 735 (9th Cir. 1960), cert. denied, 364 U.S. 934 (1961).

All that is guaranteed to every black state defendant by *Ham* is that, on voir dire, the essential demands of fairness required by the Due Process Clause of the Fourteenth Amendment must be met; *Ham* does not guarantee to every black state defendant the extension of the procedural rule required of federal courts under *Aldridge*. However, the First Circuit Court of Appeals appears to have extended its supervisory powers over the lower federal courts to include supervision of state court procedure upon voir dire. This practice has recently been condemned by the United States Supreme Court.

> "The [First Circuit] Court of Appeals in this case noted, as petitioner urged, that its review was 'the narrow one of due process, and not the broad exercise of supervisory

power that [it] would possess in regard to [its] own trial court' [473 F. 2d at 1238]. We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.' *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). We stated only this Term in *Cupp* v. *Naughten*, 414 U.S. 141 (1973), when reviewing an instruction given in a state court:

> 'Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.'"

Donnelly v. *DeChristoforo*, 416 U.S. 637 (1974).

The petitioners submit that the question at issue is not merely whether an act has occurred that is unfair, but whether there is a conspicuous and substantial error which results in a *constitutionally* unfair trial. However, the First Circuit has based its decision solely upon the "mere likelihood" of possible prejudice to the defendant. Petitioners submit that the decision of the First Circuit Court of Appeals goes beyond the scope of collateral review in habeas corpus and extends unduly the perimeters of what constitutes a constitutionally unfair trial.

> " . . . [A]part from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in *Moore* v. *Dempsey* [261 U.S. 86], that the proceeding is more a spectacle (*Rideau* v. *Louisiana*, 373 U.S. 723, 726), or trial by ordeal (*Brown* v. *Mississippi*, 297 U.S. 278, 285) then a disciplined contest." *United States* v. *Augenblick*,' 393 U.S. 348, 356 (1969).

Petitioners, therefore, request this Court to reestablish a judicial balance between federal and state courts by requiring a showing of real prejudice before the federal court may intervene.

> "The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis* v. *Parker*, 187 U.S. 606, 609), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt — that discredit will even touch the great immunities assured by the Fourteenth Amendment — if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934).

Therefore, petitioners submit that the First Circuit Court of Appeals has impermissibly extended its supervisory power over the state court. It has, in effect, ignored the good-faith allegiance that state court judges pledge to a vigorous enforcement of the United States Constitution — even in their own courts.

III. The Interpretation Accorded Ham v. South Carolina, 409 U.S. 524 (1973), by the First Circuit Court of Appeals should Not be Retroactively Applied.

The First Circuit Court of Appeals extended the *Ham* decision and accorded it retroactive effect. The Court simply inferred that retroactive application of *Ham* was mandated by this Court's treatment of the petition for writ of certiorari in *Ross* v. *Massachusetts*.[10]

> "The Supreme Court implicitly decided that *Ham* applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded that case to that court for reconsideration in light of *Ham*. . . ." *Ross* v. *Ristaino*, 508 F. 2d 754, 756 (1st Cir. 1974).

[10] Petitioners submit that the granting of certiorari in *Ross* five days after the decision in *Ham* and the summary vacation and remand of *Ross* for reconsideration in light of *Ham* merely indicates that *Ham* was indeed limited in its application to those cases presenting special circumstances or to those cases fitting within the factual framework of the *Ham* case. Had this Court in *Ham* pronounced a constitutional rule of universal applicability, the Court would have reversed outright or reversed and remanded for further proceedings not inconsistent with the *Ham* decision. Compare *Heller* v. *New York*, 413 U.S. 483 (1973), dissenting opinions at 494, 495.

Moreover, the petitioners submit that nothing in this Court's opinion in *Ham* indicates that a decision on the merits of the question of retroactivity was reached.

Petitioners suggest that if the First Circuit Court of Appeals' expanded view of *Ham* is correct as a matter of constitutional law, then this new rule should not be applied retroactively to cases in which trial has commenced prior to the date of that decision.

In *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965), this Court recognized that the Constitution neither prohibited nor required retroactive application of a decision. Following *Linkletter*, this Court developed guidelines for making the determination as to whether a decision, announcing a new constitutional rule, should be accorded retrospective application.

> "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson* v. *New Jersey*, 384 U.S. 719, 728 (1966).

In *Stovall* v. *Denno*, 388 U.S. 293 (1967), holding *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), applicable only to those cases (*Wade* and *Gilbert*), and to all future cases arising after the date of that decision, this Court stated the consideration which should affect the judgment as to whether a case announcing a new constitutional rule should be applied prospectively only, to be:

"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, at 297.

The petitioners suggest that the question of the retroactive application to be accorded the rule in *Ham* is susceptible to analysis under the three-prong test enunciated in *Stovall*, *supra*.[11]

In applying the first, or purpose, factor, the Court has sought to determine whether the error the new rule seeks to cure substantially impaired the truth-finding function of the court, thus casting substantial doubt on the over-all reliability of the guilt-determining process. *Stovall* v. *Denno*, *supra*. This Court, however, in *Stovall*, cautioned against an absolute application of this principle.

"[A]lthough the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, 'the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' *Johnson* v. *New Jersey*, [384 U.S. 719 (1966)], 728-729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.' 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the

[11] Cf. *Robinson* v. *Neil*, 409 U.S. 505 (1973), and *Moore* v. *Illinois*, 408 U.S. 786 (1972).

impact of retroactivity upon the administration of justice." *Stovall* v. *Denno*, at 298.

Therefore, the fact that the purpose of the new rule affects or aids the truth-determining process does not *require* that the rule be given retroactive effect.

Assuming, for the purpose of argument, that a new constitutional rule of universal application was announced in *Ham*, the petitioners submit that the purpose of that rule was directed toward the function of the jury. Therefore, consideration of the prospective application that petitioners suggest should be accorded *Ham* falls within the context of the decisions of this Court involving a defendant's right to trial by an impartial jury.

In *DeStefano* v. *Woods*, 392 U.S. 631 (1968), this Court held that *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and *Bloom* v. *Illinois*, 391 U.S. 194 (1968), should be granted prospective effect only. In *Duncan* the court had held that, since

"trial by jury in criminal cases is fundamental to the American scheme of justice, . . . the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee." (Footnote omitted.) 391 U.S. at 149.

In *Bloom*, this Court held that the right to jury trial applied to serious criminal contempts. 391 U.S. at 201-210. The Court has stated that the purpose of the right to an impartial jury is to "prevent arbitrariness and repression." *DeStefano* v. *Woods*, *supra*, at 633. Similarly, the new rule announced in

Ham arose within the context of alleged arbitrary and repressive prosecution based upon the defendant's race.

In *DeStefano*, the Court concluded that even given such a purpose it did not follow that every judgment rendered prior to the decisions in *Duncan* and *Bloom* were so fatally infected with unfairness as to require reversal. Nor, the petitioners submit, does it follow that every decision rendered prior to *Ham* was fatally infected with unfairness.

While the petitioners acknowledge that allowing a black defendant to ask questions directed to racial prejudice of the prospective jurors may aid in determining the impartiality of the fact finders, other factors should be considered:

> " . . . We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." *Johnson* v. *New Jersey*, 384 U.S. at 729 (1966).

In the instant case, the defendant had the additional protection of peremptory challenges to safeguard his right to an impartial jury. See: *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971) (dissenting opinion of Justice Black).

To require that a new rule be accorded retroactive effect it must be demonstrated that the "major purpose of [the] new constitutional doctrine is to overcome" a trial aspect "that *substantially* impairs its truth-finding function." (Emphasis supplied.) *Williams* v. *United States*, 401 U.S. 646, 653 (1971).

Unless this Court is willing to assume that, in every case involving a black defendant, failure to ask the proposed questions will necessarily result in a jury infected with racial prejudice, it cannot be maintained that the voir dire procedure

utilized prior to the *Ham* decision substantially impaired the truth-finding function.

Recently, this Court ruled in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), that the Louisiana jury-selection system, whose operation resulted in the near exclusion of women from jury service, violated a defendant's Sixth and Fourteenth Amendment right to an impartial jury trial. The defendant's conviction was reversed. On January 21, 1975, this Court considered, on appeal, the case of *Daniel* v. *Louisiana*, 420 U.S. 31 (1975), raising the same issue decided in *Taylor*. The Court held:

> " . . . *Taylor* is not to be applied retroactively, as a matter of federal law, to convictions obtained by juries empaneled prior to the date of that decision." *Daniel*, at 32.

The purpose of the rule enunciated in *Taylor* and in *Duncan*, as in *Ham*, petitioners suggest, is directed toward the function of the jury in the criminal justice system: to ensure impartiality and prevent arbitrariness and repression. In terms of the purpose of the new rule, petitioners suggest that nothing in *Ham* demonstrates a more fundamental consideration than that enunciated in *Taylor* or in *Duncan*. Therefore, there is no basis for according the rule in *Ham* more extensive application than those rules announced in *Duncan*, *Bloom*, and *Taylor*.

The petitioners suggest that the reliance factor in the instant case is equally as great as in *Duncan* and *Taylor*. Prior to *Ham*, there had been no indication that the specific content of voir dire questions, normally resting within the discretion of the trial judge, were subject to specific constitutional

directives. See, *e.g.*, *Commonwealth* v. *Lee*, 324 Mass. 714, 717-718 (1949).

Aldridge v. *United States*, 283 U.S. 308, 310 (1931) (and its progeny), was decided solely within this Court's supervisory jurisdiction over the lower federal courts. There was, therefore, prior to *Ham*, no basis upon which a trial judge in this Commonwealth, or in other jurisdictions,[12] could foresee a specific constitutional rule requiring that questions directed toward the specific question of racial prejudice be put to prospective jurors in every instance.

> "If there is to be a new *voir dire* rule, mandating upon request the injection of a racial prejudice issue into the case, I am not prepared to fault the trial judge for not knowing it before it was promulgated." *Ross* v. *Ristaino*, 508 F. 2d at 760 (dissenting opinion of Circuit Judge Moore).

The petitioners further suggest that to accord the expanded interpretation of *Ham* retroactive effect would necessitate the retrial of a significant number of defendants[13] and would have a substantial impact on the administration of criminal justice.

The Chief Justice of the Supreme Judicial Court has deemed the effect to be "calamitous" and has outlined the practical effect of such a decision.

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[12] *Commonwealth* v. *Brown*, 228 Pa. Super. 166, 323 A. 2d 281 (1974).

[13] The following cases are now pending in the First Circuit Court of Appeals: *Dukes* v. *Waitkevich*, No. 75-1179; *Ryles* v. *Ristaino*, No. 75-1099. (In both cases, the issuance of the writ of habeas corpus by the federal District Court has been stayed pending respondent's appeal.) In the federal District Court, the following cases are pending on petitions for writs of habeas corpus: *Bumpus* v. *Waitkevich, et al.*, Civil Action No. 74-5197-G; *Williams* v. *Vinzant*, Civil Action No. 74-2640; *Daniels* v. *Vinzant*, Civil Action No. 74-2641-S; *Lumley* v. *Hall*, Civil Action No. 75-1739-T.

"If the First Circuit's construction of the *Ham* case were given retroactive, general application, many of those convicted and incarcerated after otherwise fair trials, which had resulted in deserved convictions, would be able to come before State and Federal courts seeking relief from those convictions. While we lack precise statistics as to the number of convicted defendants potentially affected (cf. *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 418 [1966]), our experience suggests that the number is significant. Prior to any amplifying construction of the *Ham* case or any ruling of retroactivity, seven convicted defendants[6] have asked us to reverse their convictions because, they contended, failure to interrogate jurors specifically about racial prejudice abridged their rights under the due process clause. Without doubt, many more will surface if the First Circuit's construction of the *Ham* case is accepted and given retroactive effect. Each claimant would be entitled to a hearing on the issue whether he had requested that a question as to racial bias be put to potential jurors. Each claimant who had been successful in that initial stage of the hearing would then attempt to prove that the circumstances of his case fit within the enlarged *Ham* rule. The hearings and consequent appeals alone[7] would severely exacerbate the intolerable congestion of our already congested criminal sessions. The plethora of proceedings would disrupt the orderly administration of criminal justice and preclude consideration of other cases in our criminal courts. These practical considerations buttress our belief that, as a matter of constitutional principle, the *Ham* holding is properly restricted quite narrowly to the special circumstances presented by that case and similar cases." *Commonwealth* v. *Lumley*, Mass. , , 327 N.E. 2d 683, 688 (1975).

Therefore, petitioners submit that the factors which required prospective application in *DeStefano* and *Daniel* are present in the instant case and similarly require prospective application of the broad rule of *Ham* announced in *Ross* v. *Ristaino*, 508 F. 2d 754 (1974).[14]

Should this Court take a limited view of *Ham*, *i.e.*, that on the special facts of that case — where the defendant was a special target of racial prejudice and his principal defense was that the prosecution was racially motivated — there is no retroactivity issue. For this Court merely held that, under the facts of that case, refusal to ask the proposed question denied the petitioner his right to fundamental fairness as guaranteed by the Due Process Clause of the Fourteenth Amendment. No new constitutional rule was therein announced.[15]

Were this Court to hold that the First Circuit Court of Appeals' expansive interpretation of *Ham* should be given retrospective effect, the petitioners submit that its application should be limited to those cases still pending upon direct review and not extended to those cases in which judgment has become final. While the instant case was pending on a petition for writ of certiorari at the time of the narrow *Ham* decision, judgment became final after the Supreme Judicial Court reconsidered the case and affirmed, and Ross' second petition for writ of certiorari was denied.

The case is now before this Court as a result of Ross' collateral attack upon his state court conviction by way of federal habeas corpus.

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[14] See also: *Gosa* v. *Mayden*, 413 U.S. 665 (1973), holding prospective *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), which held that servicemen are entitled to indictment by grand jury and trial by civilian jury for non-service connected offenses.

[15] Compare the issues presented in *Stovall* v. *Denno*, 388 U.S. 293 (1967).

The petitioners suggest that where the judgment of the state court has become final before a new procedural rule has been promulgated, principles of comity and federalism, and the very nature of the "Great Writ" itself, must be considered in determining whether a new rule is to be applied retroactively to a state court conviction attacked collaterally upon a petition for writ of habeas corpus.

The writ of habeas corpus traditionally has been used to safeguard fundamental federally protected rights.

> "The whole history of the writ — its unique development — refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. . . ." *Townsend* v. *Sain*, 372 U.S. 293, 311-312 (1963).

Therefore, where the procedures utilized to convict were fundamentally fair at the time of the conviction, that is, in accordance with the commands of the Fourteenth Amendment, then it would appear to expand the scope of habeas corpus to require a reversal of a final conviction merely because of a subsequent announcement of a new "procedural due process" rule. See: *Mackey* v. *United States*, 401 U.S. 667, 682-692 (1970) (Harlan, J., concurring in part and dissenting in part).

"[N]ot every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or § 2255 proceedings after a conviction has become final." ***Kaufman*** v. ***United States***, 394 U.S. 217, 232 (1969) (Black, J., dissenting).

To require retroactive application of a procedural rule to cases on habeas corpus ignores the traditional scope of the proceedings as a challenge to fundamental or substantial errors, and, in effect, expands the scope of review to that of direct appellate review.

Therefore, petitioners suggest that the new procedural due process rule announced in ***Ham*** should not be accorded retroactive application to cases pending on collateral attack.

" . . . given the fundamental place of federalism in the traditional conception of constitutional adjudication, it could certainly be strongly argued that the lower courts could properly follow the traditional due process approach until the time this Court made it clear that a particular Bill of Rights guarantee had been incorporated." *Desist* v. *United States*, 394 U.S. 244, 267 (1969) (Justice Harlan dissenting).

Conclusion.

For the reasons stated above, the petitioners respectfully request this Court to remand the case to the First Circuit Court of Appeals with directions to reverse its order granting the writ of habeas corpus.

Respectfully submitted,[18]

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